



**Githaiga v Director of Public Prosecutions & 2 others; Seraph Engineering Limited & another (Interested Parties) (Constitutional Petition E584 of 2024) [2025] KEHC 12290 (KLR) (Constitutional and Human Rights) (12 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 12290 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E584 OF 2024**

**AB MWAMUYE, J**

**AUGUST 12, 2025**

**IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 20, 22, 28, AND 29 OF THE CONSTITUTION OF KENYA (2010)**

**AND**

**IN THE MATTER OF THE VIOLATION OF ARTICLE 47 AND ARTICLE 157 OF THE CONSTITUTION OF KENYA (2010)**

**BETWEEN**

**LUCY WAMAITHA GITHAIGA ..... PETITIONER**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 2<sup>ND</sup> RESPONDENT**

**PATRICK MWETI KAILKIA ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**SERAPH ENGINEERING LIMITED ..... INTERESTED PARTY**

**FREDRICK ORAWO OKELLO ..... INTERESTED PARTY**

**JUDGMENT**

1. The Petitioner, who is a relationship manager of Standard Chartered Bank Kenya Limited, approached this court vide a Petition dated 23<sup>rd</sup> October 2024 seeking the following orders: -



- a. A declaration be issued that the criminal investigations of the Petitioner by the 2<sup>nd</sup> Respondent and the institution of criminal proceedings by the 1<sup>st</sup> Respondent in Nairobi Chief Magistrates' Court Criminal Case Number E751 of 2024 Republic v Lucy Wamaitha Githaiga violates the Petitioner's right to fair administrative action under Article 47 of the Constitution and is an abuse of the process of the court and therefore unlawful null and void ab initio.
  - b. A declaration that in the prosecution of the Petitioner, the 1<sup>st</sup> Respondent abdicated his constitutional duty under Article 157 (11) of the Constitution to prevent and avoid the abuse of the legal process.
  - c. An order of certiorari be issued quashing the proceedings in Nairobi Chief Magistrates' Court Criminal Case Number E751 of 2024 Republic v Lucy Wamaitha Githaiga.
  - d. An order of prohibition be issued prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and any of their officers from proceeding with the investigation or prosecution of the Petitioner in Nairobi Chief Magistrates' Court Criminal Case Number E751 of 2024 Republic v Lucy Wamaitha Githaiga
  - e. An order of prohibition be issued prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and any of their officers from recommending or commencing the prosecution of the Petitioner in future in respect of the same facts and evidence over which Nairobi Chief Magistrates' Court Criminal Case Number E751 of 2024 Republic v Lucy Wamaitha Githaiga were instituted.
  - f. Costs of this Petition.
  - g. Any other orders as the Court shall deem just and appropriate.
2. The Petition was accompanied by an Affidavit in support dated 22<sup>nd</sup> October, 2024 sworn by the Petitioner, Lucy Wamaitha Githaiga to which she averred that she was employed as a relationship manager for Standard Chartered Bank Kenya Limited where the 1<sup>st</sup> Interested Party opened a Kenya Shilling current account numberXXXXXXXXXXXX on 31<sup>st</sup> August 2018 but was closed due to accrued bank charges on 25<sup>th</sup> April 2021 and a US Dollar Current Account numberXXXXXXXXXXXX on 3<sup>rd</sup> August 2018 but was classified as dormant in August 2020.
  3. She avers that she knew the 1<sup>st</sup> Interested Party director, Mr. Okello as the sole signatory of the bank accounts since 2019. According to the Petitioner, Mr. Okello completed additional account opening application which she received on 9<sup>th</sup> March 2021 and a new Kenya Shilling current account numberXXXXXXXXXXXX was opened on 26<sup>th</sup> March 2021.
  4. She further asserts that Mr. Okello then completed a dormant unclaimed account reactivation authorization memo for the US Dollar current account which was received by the Petitioner on 16<sup>th</sup> March 2021 and was reactivated on 19<sup>th</sup> March 2021. She asserts that on 26<sup>th</sup> March 2021, the sum of Kshs. 13,283,469.00 was received from Kenya Pipeline Company Limited and credited to the Kenya Shilling current account.
  5. The Petitioner asserts that she and the bank had no knowledge of the 3<sup>rd</sup> Respondent at the time or his involvement with the 1<sup>st</sup> Interested Party until 1<sup>st</sup> April 2021 when he visited the head office and complained that account XXXXXXXXXXXXXXX had been opened without his consent. He further lodged a complaint on 31<sup>st</sup> March 2024 with the 2<sup>nd</sup> Respondent who commenced investigations.
  6. She contends that she was summoned by the DCI to record a statement on 24<sup>th</sup> May 2021 and she appeared on 21<sup>st</sup> June 2021 and recorded her statement before Boaz Ogaga, the investigating officer.



- She avers that the 3<sup>rd</sup> Respondent instituted a civil case against her, the bank, the 1<sup>st</sup> Interested Party and Mr. Okello in High Court Commercial Case No. 005 of 2023 – Patrick Mwetii Kailikia vs Fredrick Okello Orawo & 3 others.
7. She further contends that she was summoned by the 2<sup>nd</sup> Respondent to provide clarification on her statement and upon arrival on 24<sup>th</sup> July 2024 at the headquarters, she was placed under arrest for conspiracy to defraud Mr. Mwetii by falsely opening Kenya Shilling Current Account number XXXXXXXXXXXXXXXX domiciled at the bank and pretending as if it is a genuine account for the 1<sup>st</sup> Interested Party. She was later taken to Muthaiga Police station and released on police cash bail of Kshs. 50,000.00 and later on 25<sup>th</sup> July 2024, she was arraigned in court for plea taking and thereafter released on Kshs. 300,000.00 bail.
  8. According to the Petitioner, her rights under Article 47 of *the Constitution* were violated since she was never given written reasons why the 1<sup>st</sup> Respondent decided to charge her three years after the alleged offence, the 1<sup>st</sup> Respondent charging the Petitioner three years after the alleged offence is not expeditious and efficient, the conduct of the 2<sup>nd</sup> Respondent summoning the Petitioner and immediately arresting her without further interrogation is procedurally unfair and finally the decision of the 1<sup>st</sup> Respondent to charge the Petitioner without discovery of any new evidence or circumstances is unlawful and constitutes an abuse of prosecutorial powers and an improper use of the criminal process.
  9. In response and in opposition to the Petition, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a replying affidavit dated 13<sup>th</sup> November 2024 sworn by IP Boaz Ogaga who avers that on 31<sup>st</sup> March 2021, the 2<sup>nd</sup> Respondent received a letter of complaint from the 3<sup>rd</sup> Respondent, Patrick Mwetii that the 2<sup>nd</sup> interested Party, Fredrick Okello Orawo one of the Directors of Seraph Engineering Company defrauded him through opening an alternate account no. XXXXXXXXXXXXXXXX at Standard Chartered Bank and channeled Kshs. 13,283,469.00 without the knowledge of the co- director.
  10. They further aver that they proceeded to investigate the matter and upon receiving the bank statements they discovered that the Petitioner had conspired with the 2<sup>nd</sup> Interested Party to open an alternate account without the knowledge of his co-director. They attached the CR12 of the company that shows that the directors of the 1<sup>st</sup> Interested Party are Fredrick Okello Orawo and Titus Mutea Ntuchi however, Titus Mutea Ntuchi resigned from being a director on 25<sup>th</sup> June 2020.
  11. They further state that the investigating team compelled the attendance of the Petitioner before them on 21<sup>st</sup> June 2021 and upon being satisfied that there were grounds to cause the said accounts to be investigated, the Chief Magistrate Court sitting at Milimani, Nairobi granted the 2<sup>nd</sup> Respondent orders to investigate the accounts which led thereafter to the arrest of the Petitioner herein.
  12. They contend that the Petitioner has not demonstrated that in the undertaking the said investigations and summoning the Petitioner appearing before the Directorate of Criminal Investigations or the Director of Public Prosecutions acted without or in excess of the power conferred upon them by law or have infringed, violated, contravened or in any manner failed to comply or respect and observe the foregoing provisions of *the Constitution* of Kenya 2010 or any other provisions thereof or any other provisions of law.
  13. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents further contend that the investigating officers were discharging their statutory duties as enshrined in *the Constitution* and that they were frustrated by the conduct of the Petitioner in an attempt to defeat justice by not providing documents which are in her custody. They further believed that the Petition herein was filed in bad faith, misconceived and an abuse of the court process meant to defeat the course of justice and should therefore be dismissed.



14. In opposition and in response to the Petition, the 3<sup>rd</sup> Respondent equally filed a Replying affidavit dated 8<sup>th</sup> November 2024 and sworn by Patrick Mweti Kailikia to which he averred that he is a co-director/shareholder to the 2<sup>nd</sup> Interested Party. He states that after execution of agreements, he was issues with shares and appointed a director of the 1<sup>st</sup> Interested Party as of 25<sup>th</sup> June 2020.
15. According to him vide the Memorandum and Articles of Association provided that the decisions of the company were to be by way of at least 2 directors. He asserts that they agreed with the 2<sup>nd</sup> Interested Party that all the major project funds and dealins would be handled through the 1<sup>st</sup> Interested Party's accounts at Kenya Commercial Bank but unknown to him, the 2<sup>nd</sup> Interested Party fraudulently opened another account held at Standard Chartered Bank and further caused the fraudulent transfer of the project funds herein without his consent and knowledge.
16. He asserts that upon realization of the ongoing fraud, he reported the matter to the Directorate of Criminal Investigations where after investigations it became apparent that it was the Petitioner herein who authorized the opening of the bank account. He avers that the Petitioner was in complicit in the fraud against him by the 2<sup>nd</sup> Interested Party.
17. He further asserts that the discretion to charge and the charges being preferred lays with the Director of Public Prosecution and that the Petitioner ought to prove her innocence before the magistrate's court and in fact the criminal trial process avails to her avenues to prove her innocence all the way to the appellate court.
18. The 3<sup>rd</sup> Respondents contends that the Petition herein is a classic example of an abuse of the court process and an attempt to remove him from the seat of justice and filed yet again in concert with the 2<sup>nd</sup> Interested Party to delay the trial of the 2<sup>nd</sup> Interested Party having failed to stop the charges against him when the judicial review application No. E008 of 2021 was dismissed with costs having observed that the process leading to the charging of the Petitioner and the 2<sup>nd</sup> Interested Party was not marred by illegality, irrationality or procedural impropriety.
19. He further contends that the instant Petition is an innovative way of appealing against the Judicial Review decision at an attempt of circumventing justice without exhaustion of all the available statutory remedies and in addition, the Petition does not meet the threshold set in Anarita Karimi Njeru case and should therefore be dismissed.
20. The 1<sup>st</sup> Interested Party equally filed a replying affidavit dated 24<sup>th</sup> January, 2025 sworn by Jackson Akenga, the Company Secretary of Seraph Engineering Limited. He averred that Fredrick Okello Orawo is the sole beneficial owner of Seraph Engineering Limited and that Patrick Mweti Kailikia, the 3<sup>rd</sup> Respondent herein, is listed as a director and shareholder of Seraph Engineering only as a security to a loan agreement and in a limited condition/status as contained in the pledge agreement.
21. He affirmed that the 1<sup>st</sup> interested party is the owner of the disputed bank account No. XXXXXXXXXXXXXXX and the USD account XXXXXXXXXXXXXXX at Standard Chartered Bank and also the owner of Kshs. 13,283,469.00 and that the 3<sup>rd</sup> Respondent has no authority to complain over the said account and should only act on express instructions or resolution of the Company and therefore has no locus, authority, power or discretion to lodge a criminal case involving the company's money and bank account.
22. The Petitioner filed a further affidavit dated 7<sup>th</sup> March 2025 and sworn by herself which she reiterated contents of her affidavit in support of the Petition. She further averred that she had no knowledge of the 3<sup>rd</sup> Respondent's involvement with the 1<sup>st</sup> Interested Party and that she did not open the US



Dollar account with a view of defrauding the 3<sup>rd</sup> Respondent. She also stated that she was not a party to judicial review proceedings and is therefore not aware of the application or the judgment delivered.

23. The petition was canvassed by way of written submissions, and in compliance all parties except the 2<sup>nd</sup> Interested Party filed and served their submissions.

### **Petitioner's Submissions**

24. The Petitioner filed written submissions dated 7<sup>th</sup> March, 2025 where she reiterated contents of her Supporting affidavit and further affidavit. She further submitted that her prosecution in MCCR E751 of 2024 is an abuse of the Court process since it is based on an abuse of prosecutorial powers and improper use of the criminal process in violation of Article 157(6) and (10) of *the Constitution*. In support of the same, the Petitioner relied on the Supreme Court cases cited as Saisi & 7 others v Director of Public Prosecutions & 2 others [2023] KESC 6 (KLR), Jirongo v Soy Developers Ltd & 9 others [2021] KESC 32 (KLR) and the Court of Appeal cases namely; Firstlings Supplies Limited v Director of Public Prosecutions [2022] KECA 979 (KLR) and Commissioner of Police & the Director of Criminal Investigations Department & Another v Kenya Commercial Bank Limited & 4 others [2013] eKLR.
25. The Petitioner argues that there has been no discovery of any new evidence or change in circumstances to explain the delay in deciding to charge and prosecute the Petitioner in MCCR No. E751 of 2024. She further argues that the factual foundation is based on evidence that was available to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in 2021 which was insufficient to sustain a criminal charge thus a blatant breach of Article 157 of *the Constitution* to abruptly choose to charge someone based on evidence that was more than three years old. They Cited the case of Ronald Leposo Musengi v Director of Public Prosecutions and the case of Republic v Director of CID & Inspector General of Police ex- parte Ronald Morara Ngisa [2018] KEHC 8414 (KLR).
26. The Petitioner argues that she should not be compelled to go through criminal proceedings that have been instituted for extraneous and improper purposes and the mere fact that she will have an opportunity to defend herself within the criminal process does not justify allowing a trial that is fundamentally flawed, unlawful and unfair to proceed.
27. According to the Petitioner, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have breached her constitutional right to fair administrative action by failing to provide any reasonable explanation as to why they did not charge her 3years ago or why the evidence in their possession was not sufficient to sustain the charges brought against the Petitioner. She further states that the deceptive conduct and the lack of interrogation by the 2<sup>nd</sup> Respondent is a violation of Article 47 of *the Constitution* and Section 4 (3)(a) of the Fair Administrative Act which demonstrates the 2<sup>nd</sup> Respondent's disregard for constitutional safe guards designed to protect individuals from arbitrary and unfair administrative actions. Reliance was placed on the case of George Joshua Okungu & another v Chief Magistrate's Court Anti-Corruption Court at Nairobi & another [2014] eKLR and Director of Public Prosecutions v Attorney General & 12 others [2022] KECA 397 (KLR) among others.

### **1<sup>st</sup> And 2<sup>nd</sup> Respondents' Submissions**

28. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed submissions dated 10<sup>th</sup> March 2024 where they relied on the Replying Affidavit sworn by Boaz Ogaga and dated 13<sup>th</sup> November 2024. They argued that they followed due process in the arraignment of the Petitioners in court in accordance to the mandate granted by *the Constitution* under Article 157 of *the Constitution*. They cited the case of Pauline Raget Adhiambo Agot v DPP and 5 others (2010) Petition No. 446 of 2015, Republic v The Commissioner of Police &



the Director of Public Prosecution ex parte Michael Monari & Another Misc Application No. 68 of 2011 and the case of Cascade Company Limited vs Kenya Association of Music Production (KAMP) & others, Petition No. 7 of 2014.

29. They submitted that the Petitioner has failed to demonstrate to this Court how the 1<sup>st</sup> Respondent acted contrary to public interest, the interest of administration of justice or failed to prevent and avoid abuse of the legal process. They aver that whereas the Petitioner had the right not to be subjected to an illegal and/or unwarranted criminal process, the Director of Public Prosecution was also under a public duty to ensure that offences were prosecuted and those culpable attended to as the law required. They relied on the decision in *Maina & 4 others vs Director of Public Prosecutions & 4 others* 9 Constitutional Petition E106 & 160 of 2021 (Consolidated) (2022) KEHC 15 (KLR) (Constitutional and Human Rights) (27 January 2022) (Judgment).
30. They further argued that it is an established principle that where a party alleges a breach of fundamental rights and freedoms, he or she must state and identify the rights with precision and how the same have been or will be infringed in respect to him. Reliance was placed on the case of *Leonard Otieno v Airtel Kenya Limited* [2018] eKLR. Further, the Petitioner has not set out with precision the manner in which the 1<sup>st</sup> Respondent has infringed their fundamental rights and freedoms to warrant the intervention of this Honourable Court. According to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent the Petitioner's fundamental rights are not absolute and must be balanced with the rights of others and public interest.

### 3<sup>rd</sup> Respondents Submission

31. The 3<sup>rd</sup> Respondent filed submissions dated 12<sup>th</sup> March 2024 where he submitted that the decision to charge the Petitioner does not violate her rights under Article 47 of *the Constitution* which guarantees the right to fair trial which includes the right to a fair hearing before an action is taken. He submits that the Petitioner herein was duly informed of the charges against her and the charges were brought following a lawful investigation by the 2<sup>nd</sup> Respondent which was concluded with the recommendation for prosecution by the 1<sup>st</sup> Respondent.
32. He further argued that the decision to prosecute is within the discretion of the 1<sup>st</sup> Respondent and should not be interfered with unless it is shown to be made in bad faith and without reasonable cause. He asserts that the prosecutorial discretion is not subject to review unless shown to be exercised in bad faith or in violation of *the Constitution*. Reliance was placed on the case of *Republic v Director of Public Prosecutions & Another ex parte Michael Monari* and the case of *Muriithi v Director of Public Prosecutions* [2016] eKLR.
33. The 3<sup>rd</sup> Respondent submits that there is no basis for issuance of Certiorari or Prohibition order against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents since they are lawfully empowered to recommend and initiate prosecution based on the evidence gathered by the 2<sup>nd</sup> Respondent and there is no indication of bad faith, abuse of power, or any other improper motive behind the prosecution therefore the instant Petition should be dismissed. Reliance was placed on the case of *Republic v Attorney General & Another Ex Parte Gacheri* [2019] eKLR and *Republic v Director of Public Prosecution Ex Parte Joseph Kioko* [2020] eKLR.

### 1<sup>st</sup> Interested Party Submissions

34. The 1<sup>st</sup> Interested Party filed written submissions dated 27<sup>th</sup> January 2025, to which it reiterated contents of the Replying Affidavit dated 24<sup>th</sup> January, 2025 and sworn by Jackson Akenga. They argued that the doctrine of separate corporate personality applies to the criminal cases and the same should apply in the instant petition to stop the Respondents from using the company's bank account details



to prosecute a bank's employee over matters which the company confirms were duly and lawfully executed on proper instructions of the company.

35. The 1<sup>st</sup> Interested Party contends that the criminal case before the trial court are as a result of a purported commercial disagreement between the 3<sup>rd</sup> Respondent and the 2<sup>nd</sup> Interested Party accordingly, its debts if any and loan agreements have nothing to do with the Petitioner.
36. They further submit that it is not clear how the 1<sup>st</sup> and 2<sup>nd</sup> Respondents settled on the Petitioner for prosecution and not any other employee and the only lawful and proper complainant against the bank, if any can only be by the Company therefore the criminal prosecution of the bank employee and the director should be stopped.

### **Analysis And Determination**

37. I have considered the pleadings, arguments by parties and the decisions relied on. The issue that arises for determination is whether the Petitioner's constitutional rights have been infringed upon that warrants this court to halt criminal proceedings before the trial court.
38. The threshold of a constitutional petition was clearly formulated in the case of Anarita Karimi Njeru vs the Republic (1976-1980) KLR 1272. It should be noted that the aforesaid case has been relied upon from time to time again to demonstrate the said threshold.
39. Let me begin by reiterating that this is a constitutional petition in which the Petitioner allege violation of her constitutional rights. The underlying issue is the Petitioner's challenge to the exercise of the powers of the DPP and the DCI and the contention that their actions have resulted to the infringement of her rights under *the Constitution*.
40. The legal basis for the exercise of prosecutorial powers in Kenya is *the Constitution* of Kenya, 2010. Article 157 of *the Constitution* establishes the Office of the Director of Public Prosecutions (ODPP). The *Office of the Director of Public Prosecutions Act* No. 2 of 2013 (the ODPP Act) was also enacted to give effect to Articles 157 and 158 of *the Constitution*, other relevant provisions of the law and for connected purposes.
41. Section 4 of the ODPP Act provides for the fundamental principles which guides the DPP in prosecution of cases. The principles include; impartiality and gender equity; diversity of the people of Kenya; rules of Natural Justice, promotion of public confidence in the integrity of the office, the need to serve the cause of justice; prevention of abuse of the legal process and public interest; and, promotion of constitutionalism. The ODPP Act, among other statutes, variously provides for the manner in which the DPP ought to discharge its mandate. Suffice to say, the exercise of prosecutorial powers of the DPP has been subjected to legal scrutiny and appropriate principles and guidelines developed.
42. The DPP has constitutional mandate and discretion to initiate, continue and, or terminate criminal prosecutions. In doing so, the DPP does not require consent or permission from any person or authority. The DPP must, however, exercise his powers in a manner that has regard to public interest, interest of administration of justice and the need to prevent and avoid abuse of the legal process.
43. For the Petitioner to succeed, she has to show that the DPP, in deciding to mount the prosecution against him, the decision was not made in public interest and interest in the administration of justice, but that the decision is an abuse of the legal process.
44. The Petitioner's case is clear from the depositions in her affidavits and submissions is that her rights under Article 47 of *the Constitution* were violated since she was never given written reasons why the 1<sup>st</sup> Respondent decided to charge her three years after the alleged offence, the 1<sup>st</sup> Respondent charging the



Petitioner three years after the alleged offence is not expeditious and efficient, the conduct of the 2<sup>nd</sup> Respondent summoning the Petitioner and immediately arresting her without further interrogation is procedurally unfair and finally the decision of the 1<sup>st</sup> Respondent to charge the Petitioner without discovery of any new evidence or circumstances is unlawful and constitutes an abuse of prosecutorial powers and an improper use of the criminal process.

45. I do not see the arguing that the decision to prosecute him is against public interest; is not in furtherance of interest of administration of justice, or that the decision is an abuse of the legal process. What I see is the allegation that it has taken the Respondents three years to charge her and there being no new evidence in support of the charges why it has taken the 1<sup>st</sup> and 2<sup>nd</sup> Respondent so long to institute charges against him.
46. The concerns raised, in my respective view, do not fall within the caveat in Article 157(11). That is the Petitioner has not demonstrated that the decision to prosecute her is against public interest; does not further interest of the administration of justice, or that it is an abuse of the legal process. The argument that it has taken the 1<sup>st</sup> and 2<sup>nd</sup> Respondents three years to institute a case against the Petitioner may not be a basis for halting the prosecution as this will depend on the evidence to be adduced during trial.
47. Similarly, on whether or not there is new evidence propelling the criminal charges against her or not can only be answered by stating that sufficiency of evidence or otherwise to be lead during trial, is a matter for the trial court and not this court.
48. In this regard, the decision of the Court of Appeal in *Director of Public Prosecutions v Martin Mina & 4 others* [2017] eKLR comes to mind. The Court of Appeal stated that it is not “the duty of the High Court ... to evaluate the sufficiency of the evidence in the envisaged criminal proceedings, that is the function of the trial court, or the High Court in a criminal appeal. A Judicial Review Court should not usurp the functions of a trial court, except in the clearest of the cases.” Whether or not the evidence would be sufficient for making the decision to prosecute the Petitioner will be answered by the trial court and not this court.
49. In my view, it is the DPP’s mandate, if he is satisfied that there is sufficient evidence to sustain criminal prosecution, to initiate and continue such prosecution. The court would only interfere if the Petitioner demonstrated to the satisfaction of this Court, that the DPP was exercising his discretion contrary to Article 157(11) of *the Constitution*.
50. In the present petition, the Petitioner has not pointed out how the DPP has abused his discretion in making the decision to prosecute her, in violation of Article 157(11) to call on this court’s review jurisdiction to halt the prosecution.
51. It was on that respect that the Court of Appeal held in *Meixner & Another v Attorney General* [2005] 2 KLR 189, that judicial review is concerned with the decision-making process and not with the merits of the decision itself. From the material placed before the court, the Petitioner has not satisfied the threshold to persuade this court exercise its jurisdiction and halt the criminal proceedings in the magistrate’s court.
52. The National Police Service on the other hand is a creature of *the Constitution* of Kenya, 2010. Article 239 (1) (a), (b) and (c) of *the Constitution* of Kenya provides that: -

“The National Security organs are the Kenya Defence Forces, the National Intelligence Service and the National Police Service.”



53. Section 28 of the *National Police Service Act* No. 11 of 2011 stipulates that: -
- “There is established the Directorate of Criminal Investigations which shall be under the direction, command and control of the Inspector General.”
54. Article 245 (2) (b) of *the Constitution* of Kenya further provides that: -
- “The Inspector General shall exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation.”
55. Notably, investigations are a mandate of the National Police Service (NPS). They are legal processes aimed at fact finding of commission of crime in our justice system and do not amount to infringement in the rights or fundamental freedoms of any person who is under investigations per se. It is an independent function that is to be carried out by the Inspector General without direction from any other person.
56. Section 51 of the *National Police Service Act* empowers a police officer to among others: collect and communicate intelligence affecting law and order, to detect offenders, and to bring them to justice in addition to investigating crime.
57. This court could also not purport to direct the 2<sup>nd</sup> Respondent on how to carry out investigations or when to institute criminal proceedings. Doing so would be tantamount to infringing on their mandate that was well set out in *the Constitution* of Kenya. Merely feeling inconvenienced by investigations is not sufficient reasons for the court to interfere with the powers of the National Police Service. There must be clear cut violations to give the court an opportunity to jump in to avert any violations, breaches and/or infringements of *the Constitution* of Kenya.
58. As long as the investigations are carried out in accordance with the law and rules, the processes thereto must be allowed to run their course for proper administration of justice. Proof of violation, infringement or threat or contravention of a person’s right under *the Constitution* of Kenya required.
59. The courts have similarly addressed their mind to the powers and functions of the National Police Service. The Court in *Republic v Commissioner of Police & another ex-parte Michael Monari & another* [2012] eKLR stated that:
- “It is also clear in my mind that the police have a duty to investigate on any complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The Police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said not to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decision to charge act in responsible manner, the High Court would be reluctant to intervene.”
60. Concerning the claim that the rights of the Petitioner to fair administrative action under Article 47 as a result of the alleged investigative process; I do not think the claim is sustainable in my view. The Supreme Court has held that the power of investigation when exercised cannot be described to be an administrative act within the meaning of Article 47 as these are special powers conferred by a specific legal regime to be exercised for a special purpose.



61. The Supreme in Ethics and Anti- Corruption Commission and another vs Prof. Tom Ojienda and 2 Others (SCP No.30 of 2019 as consolidated with Petition No. 31 of 2019) on investigative power discussed as follows: -

“

“(54) So, what constitutes “an administrative action” within the meaning of Article 47 (1) of *the Constitution*? Article 47 and 260 of *the Constitution* do not define an “administrative action”. Section 2 of the FAA Act which was enacted to give effect to Article 47, defines ‘administrative action’ as follows:

“Administrative action” includes –

- i. the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
- ii. any act, omission or decision of any person, body or authority that effects the legal rights or interests of any person to whom such action relates”.

Unfortunately, the foregoing definition does not provide an accurate picture of the meaning of an “administrative action” as it simply addresses the elemental aspects of the phenomenon before describing its nature. On the face of it therefore, any power, function, and duty exercised by authorities or quasi-judicial tribunals constitutes an “administrative action”. Likewise, any act, omission or decision of any person that affects the legal rights or interests of any person to whom such action relates constitutes an “administrative action”. Such definition, without more, would bring within the ambit of an “administrative action” just about anything done, or any exercise of power by an “authority” or “quasi-judicial tribunal”.

(56) A close scrutiny of Article 47 of *the Constitution* gives a glimpse of what an “administrative action” entails. Towards this end, the said Article provides that:

- “... Parliament shall enact legislation to give effect to the rights in
- (3) clause (1) and that legislation shall
- ...
- (b) promote efficient administration.”

(57) By stipulating that the legislation so contemplated has to among other things, promote efficient administration, *the Constitution* leaves no doubt that an “administrative action” is not just any action or omission, or any exercise of power or authority, but one that relates to the management of affairs of an institution, organization, or agency. This explains why such action is described as “administrative action” as opposed to any other action. The Concise Oxford Dictionary (9<sup>th</sup> Ed) defines the word “administrative” as “concerning or relating to the management of affairs” Black’s Law Dictionary, (11<sup>th</sup> Ed) defines “administrative action” to mean “a decision or an implementation relating to the government’s executive function or a business’s management”. Burton’s Legal Thesaurus (4<sup>th</sup> Ed) defines the adjective “administrative” to mean among others, directorial, guiding, managerial, regulative, supervisory.



(58) Does the 1<sup>st</sup> appellant’s investigative powers fall within the corners of this definition? Part IV of the ACECA specifically provides for the 1<sup>st</sup> appellant’s investigative powers. The powers granted therein include powers, privileges and immunities of a Police officer under Section 23(3), to search premises under Section 29, to apply for surrender of travel documents under Section 31, to arrest persons under Section 32 amongst others. Strictly speaking, these powers when exercised cannot be described as “administrative action” within the meaning of Article 47. For example, how can “conducting a house search” or “effecting an arrest” be considered as exercising administrative action? On the contrary, these are special powers conferred by a specific legal regime, to be exercised for a special purpose.”

62. The Superior Court went on to affirm as follows:

“(61) Having already concluded that the investigative actions of the 1<sup>st</sup> appellant cannot be categorized as “administrative action” within the context of Article 47 of *the Constitution*, we find no basis upon which we can hold, that the 1<sup>st</sup> Respondent’s rights were violated for failure to observe the requirements of the said Article. Therefore, in the absence of proof of violation of his other fundamental rights and freedoms guaranteed by *the Constitution*, the impugned warrants ought not to have been quashed on the basis of this claim.”

63. Guided by the reasoning of the Supreme Court above, it is my finding that the facts in this case are in the circumstances therefore incapable of establishing a violation of the right to fair administrative action.

64. Accordingly, having the circumstances in this case, this court was unable to find that the Petitioner’s rights were violated and/or infringed as far as the above-mentioned Articles were concerned as they were summoned to appear before the DCI but they failed to do so. They did not demonstrate how their fundamental rights had been breached or denied or that there was a threat of them being infringed, contravened and/or violated warranting protection from this court.

65. This court has come to the firm conclusion that the Petitioner is seeking to restrain the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from carrying out their lawful investigative duties that had been donated to them by *the Constitution* and Statute, and hence this the Petitioner is not entitled to the reliefs she has sought in the Petition herein.

66. Accordingly, the Petition is found to be devoid of merit. The orders sought in the Petition being declarations as well as damages and costs are declined and dismissed.

67. In the interests of justice, each party shall bear its own costs.

68. Orders accordingly. File closed accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12<sup>TH</sup> DAY OF AUGUST, 2025.**

**BAHATI MWAMUYE**

**JUDGE**

In the presence of: -

Counsel for the Petitioner –Mr Lawson Ondigi

Counsel for the 1<sup>st</sup> & 2<sup>nd</sup> Respondent –Mr Mulati h/b Ms Ntabo



Counsel for the 3<sup>rd</sup> Respondent –Ms wambui h/b Mr Madiwo

Counsel for the 1<sup>st</sup> Interested party – No appearance

Counsel for the 2<sup>nd</sup> Interested party -- No appearance

Court Assistant – Ms Neema

